

SUPREME COURT OF NEW JERSEY
Docket No. 090230

IN THE MATTER OF RUTGERS,
THE STATE UNIVERSITY OF
NEW JERSEY,

Petitioner-Appellant,

and

AFSCME LOCAL 888, AMERICAN
FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO,

Respondent-Appellee.

On Petition for Certification from the
Superior Court of New Jersey,
Appellate Division
Docket No. A-0277-23

Sat Below:

Hon. Lisa Perez Friscia, J.A.D.

Hon. Stanley L. Bergman, Jr. J.A.D.

Civil Action

**BRIEF OF THE NEW JERSEY PUBLIC EMPLOYMENT
RELATIONS COMMISSION IN OPPOSITION TO PETITION
FOR CERTIFICATION**

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TABLE OF CONTENTS

	<u>Page</u>
REASONS WHY CERTIFICATION SHOULD BE DENIED	1
STATEMENT OF THE MATTER INVOLVED	4
QUESTION PRESENTED	7
ARGUMENT	7
A. Standard of Review	7
B. Preemption Law	7
C. The Title IX Regulations do not preempt grievance arbitration of employee discipline imposed pursuant to the University's Title IX policy	9
a. The Appellate Division correctly determined that the Title IX Regulations do not expressly preempt arbitration of the employee discipline	9
b. Compliance with Both Title IX regulations and the CNA is possible, thus, there can be no implied conflict	11
CONCLUSION	14

TABLE OF CITATIONS

CASES

	<u>Page</u>
<u>Bethlehem Tp. Ed. Ass’n v. Bethlehem Tp. Bd. of Ed.,</u> 91 <u>N.J.</u> 38, 44 (1982)	9
<u>Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532 (1985)</u>	3
<u>Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass’n,</u> 78 <u>N.J.</u> 25, 35 (1978)	7
<u>Local 195, IFPTE v. State, 88 N.J. 393 (1982)</u>	8
<u>N.J. Tpk. Auth. v. N.J. Tpk. Supervisors Ass’n,</u> 143 <u>N.J.</u> 185 (1996)	2, 14
<u>Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass’n,</u> 98 <u>N.J.</u> 523, 527-28 (1985)	13
<u>In re Reglan Litigation, 226 N.J. 315, 328-29 (2016)</u>	9
<u>In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020)</u>	7
<u>Ridgefield Park Ed. Ass’n v. Ridgefield Park Bd. of Ed.,</u> 78 <u>N.J.</u> 144, 154 (1978)	8
<u>State v. State Supervisory Employees Ass’n,</u> 78 <u>N.J.</u> 54, 80-82	9
<u>Teaneck Bd. Of Ed. v. Teaneck Teacher’s Ass’n,</u> 94 <u>N.J.</u> 9, 14 (1983)	8
<u>West Windsor Tp. V. PERC, 78 N.J. 98, 116</u>	13
<u>Williams v. Civil Serv. Comm’n, 66 N.J. 152, 156-57 (1974)</u>	3

NEW JERSEY REGULATIONS

<u>N.J.A.C.</u> 4A:2-2.2	12
<u>N.J.A.C.</u> 4A:2-2.9	3

NEW JERSEY STATUTES

<u>N.J.S.A.</u> 2A:24-8	14
<u>N.J.S.A.</u> 11A:2-13	3
<u>N.J.S.A.</u> 34:13A-5.4d	7
<u>N.J.S.A.</u> 34:13A-62	13
<u>N.J.S.A.</u> 18A6-10, et seq.	12

REGULATIONS AND FEDERAL REGISTER

34 C.F.R. § 106.45 (2020)	1, 5
34 C.F.R. § 106.6(h)	11
85 Fed. Reg. 30298, 30442	3,10

RULES

<u>R.</u> 2:13-4	3
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STATUTES

Title IX of the Education Amendments Acts of 1972, 20 U.S.C. §1681;	1
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REASONS WHY CERTIFICATION SHOULD BE DENIED

Additional review in this case is not necessary because the Appellate Division affirmed the Public Employment Relations Commission's (PERC) correct determination that regulations to Title IX of the Education Amendment Acts of 1972, 20 U.S.C. §1681; 34 C.F.R. § 106.45 (2020) do not preempt grievance arbitration of employee discipline imposed pursuant to Rutgers University's (University) Title IX policy. While Title IX imposes a regulatory structure on the way in which the University investigates, adjudicates, and recommends sanctions against employees (or other members of the University community) for violations of its Title IX policy, it does not regulate or disrupt a union's ability to challenge subsequent discipline imposed via binding arbitration pursuant to a collective negotiations agreement (CNA).

The critical question in this case, answered in the affirmative by both PERC and the Appellate Division, is whether the University can comply with both the Title IX regulations and the CNA between AFSCME Local 888 (Union or Local) and Rutgers. Not only is it possible to do so, but it was expressly contemplated by the Department of Education when drafting the regulations. Contrary to the University's position, collective negotiation rights do not jeopardize or diminish rights under Title IX for any University community member, as there is room

enough for both, just as there is space for grievance arbitration of discipline imposed for violations of the New Jersey Law Against Discrimination.^{1/}

The New Jersey Employer-Employee Relations Act (EERA) guarantees public employees an essential right to protect their livelihoods through the Union's ability to challenge discipline via binding arbitration, expressly authorized by the CNA. Arbitration provides an unbiased mechanism by which employee discipline is reviewed. But more importantly, it contains the essential features of neutrality and independence from the employer, a proceeding where the union and employer are equals. The regulations to Title IX do not constrain either the role of an employee organization or the rights held by employee organizations. Title IX simply does not preempt the "additional or separate rights [that] may be created for employees" through collective agreements. 85 Fed. Reg. 30298, 30442.

The Commission acknowledges that the University's obligation to comply with both the Title IX requirements and the CNA's grievance procedure may prolong the disciplinary process because it could necessitate two hearings on the same issue arising from the same set of facts. But that policy decision, imposed by a Federal agency, does not create a legal conflict. It is important to note, however,

^{1/} See *N.J. Tpk. Auth v. N.J. Tpk. Supervisors Ass'n*, 143 N.J. 185 (1996).

that this scheme is not an uncommon occurrence in the public sector, as employees have due process rights guaranteed through various constitutional and statutory provisions.^{2/} For example, employees in the civil service have a right to a live hearing before discipline is imposed, and separately have a right to appeal that discipline, after it is imposed. N.J.S.A. 11A:2-13 The Civil Service Commission then conducts or arranges for another live hearing. N.J.A.C. 4A:2-2.9.

The Title IX regulations govern Title IX disputes before sanctions are imposed, but they are silent as to post-disciplinary review by a neutral party. Since there is plainly no conflict between the regulations and the parties' CNA, and the Federal Department of Education itself has already stated it did not intend to strip employees of additional rights under collective agreements, 85 Fed. Reg. 30298, 30442, this matter does not contain the "special reasons" necessary to warrant certification. R. 2:13-4.

^{2/} See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (right to be heard before employment is terminated); *Williams v. Civil Serv. Comm'n*, 66 N.J. 152, 156-57 (1974) (right to post-termination evidentiary hearing to clear damage to reputation for some employees).

STATEMENT OF THE MATTER INVOLVED

A. Facts and Procedural History

In February 2022, the University received complaints from three employees (the complainants) alleging that they were sexually harassed by two^{3/} of their coworkers. (Pa15). At all relevant times, both the complainants and the accused employees (the respondents) were members of American Federation of State, County and Municipal Employees, Local 888, AFL-CIO (AFSCME Local 888 or “the Local”). (PA15-16). The Local represents certain employees of the University with which it has negotiated a CNA. (Pa154-69). In response to these complaints, the University initiated an investigation pursuant to the Title IX regulations and its policy governing these disputes. (Pa16). After the completion of the investigation, the University conducted a hearing, also in accordance with Title IX regulations, to determine whether the respondents violated University policy and if so, what remedial action should be taken. (Pa16-17). The complainants, the respondents, and the University, but not the Local, participated in this process as defined in the Title IX policy. (Pa58).

^{3/} Following the notice of appeal, the grievance and demand for arbitration in SN-2023-028 (Grievant “I.R.M.”) was withdrawn, leaving only the matter in SN-2023-029 justiciable (Grievant “J.M.”).

After the conclusion of hearings conducted in July 2022, the University-appointed “decision-maker” concluded that both respondent employees had violated the University Title IX and sexual harassment policies and determined there was “just cause” to terminate the employment of both employees. (Pa18). After exhausting the limited Title IX appeal process^{4/}, both employees were separated from employment in September 2022. (Pa19).

In response to the disciplinary actions, the Local filed grievances in September 2022 alleging that the University breached the CNA between the University and the Local because Rutgers did not have just cause to terminate the employment of the two grievants. (Pa19). The University, asserting that 34 C.F.R. § 106.45 preempts any negotiated disciplinary review process, such via the grievance arbitration required by the CNA here, denied the grievances. (Pa19). On September 20 and October 3, 2022, the Local submitted both grievances to arbitration by filing a request for a panel of arbitrators with the Commission’s Director of Arbitration. (Pa174-175). In response, the University filed two scope of negotiations petitions with the Commission, seeking restraints of binding

^{4/} For University employees, the Rutgers Title IX Policy allows appeals only for procedural irregularity, newly discovered evidence, or conflict of interest or bias. (Pa84-85).

arbitration. The University asserted that Title IX preempts negotiations over the CNA's disciplinary procedure. (Pa39-44).

The scope petitions were consolidated by agreement of the parties. The parties thoroughly briefed the issues and the Commission issued its final decision and order on August 24, 2023. (Pa31-32). The Commission unanimously determined that Title IX regulations do not preclude arbitration of disciplinary actions resulting from that process. (Pa31-32). Specifically, the Commission held that a negotiated disciplinary process was not preempted because, in applying PERC and New Jersey precedent, "contractual disciplinary procedures, including binding arbitration, are not preempted by laws and policies designed to eradicate sexual harassment." (Pa31-32).

This appeal ensued. (Pa4-7). After briefing and oral argument, the Appellate Division issued a well-reasoned decision affirming PERC's denial of the scope of negotiations petition. (Aa2-Aa22).

QUESTION PRESENTED

Do the regulations to Title IX conflict, either expressly or impliedly, with the additional due process provided by a collective negotiations agreement's grievance process allowing for neutral review by a labor arbitrator to ensure discipline was imposed for "just cause?"

ARGUMENT

SINCE THE UNIVERSITY CAN COMPLY WITH BOTH TITLE IX AND THE CNA, THERE IS NO LEGAL CONFLICT AND THUS, NO SPECIAL REASON TO GRANT CERTIFICATION

A. Standard of Review

Appellate review of “PERC decisions and orders shall be of a very limited scope.” *Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n*, 78 N.J. 25, 35 (1978). PERC’s scope of negotiations determinations are owed substantial deference, except where that decision is wholly based on the interpretation of a statute outside its area of expertise, in which case that “strictly legal issue” is reviewed de novo. *See In re Ridgefield Park Bd. of Educ.*, 244 N.J. 1, 17 (2020).

B. Preemption Law

Where, as here, a party seeks from PERC “a determination as to whether a matter in dispute is within the scope of negotiations,” N.J.S.A. 34:13A-5.4d, the Commission has a limited role:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer’s alleged action, or even whether there is a valid arbitration clause in the agreement or any other

question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

In determining whether a subject is mandatorily negotiable, the Commission utilizes the three-prong test articulated in *Local 195, IFPTE v. State*, 88 N.J. 393 (1982).

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

Id. at 404-405.

Where all three prongs are met, the subject is deemed "mandatorily negotiable." *Id.* It is equally well-established that "[t]he scope of arbitrability is generally coextensive with the scope of negotiability." *Teaneck Bd. of Ed. v. Teaneck Teacher's Ass'n*, 94 N.J. 9, 14 (1983).

Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it fixes a term and condition of employment expressly, specifically and comprehensively. *Bethlehem Tp. Ed. Ass'n. v. Bethlehem Tp. Bd. of Ed.*, 91 N.J. 38, 44 (1982). Statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer may not be contravened by negotiated agreement. *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 80-82 (1978).^{5/}

C. The Title IX Regulations do not preempt grievance arbitration of employee discipline imposed pursuant to the University's Title IX policy.

a. The Appellate Division correctly determined that the Title IX Regulations do not expressly preempt arbitration of employee discipline.

The Appellate Division correctly determined that Title IX regulations do not expressly preempt grievance arbitration, as the regulations do not address, even tangentially, an additional due process right that exists after discipline is

^{5/} Application of federal preemption framework, raised by the University in its Petition for Certification, produces the same result. In determining whether an implied conflict exists, this Court, noted that “[c]onflict preemption applies where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *In re Reglan Litigation*, 226 N.J. 315, 328-29 (2016) (internal quotations and citations omitted).

effectuated by a University. The Title IX regulations have been interpreted by the Department of Education itself to allow collective bargaining representatives to negotiate additional or separate rights beyond those contained in Title IX. In response to a commenter to these rules, who “suggested that the final regulations clearly state they do not preclude recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract,” the Department of Education wrote:

These final regulations do not preclude a recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations. In the Department's 2001 Guidance, and specifically in the context of the due process rights of the accused, the Department recognized that “additional or separate rights may be created for employees . . . by . . . institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements.” **The Department has never impeded a recipient's ability to provide parties with additional rights as long as the recipient fulfils its obligations under Title IX. The Department has never suggested otherwise, and we believe it is unnecessary to expressly address this concern in the regulatory text.** Although recipients may give employees additional or separate rights, recipients must still comply with these final regulations, which implement Title IX.

85 Fed. Reg. 30298, 30442

As contemplated by the Department of Education, a union could negotiate additional due process protections for its employees, such as binding arbitration of disciplinary disputes. The regulations, other than a general provision noting that the regulations have preemptive effect over conflicting state laws, contain no express prohibition against grievance arbitration. *See* 36 C.F.R. § 106.6(h). The Appellate division correctly found that “[t]he CNA authorized a review of Rutgers’ disciplinary decision through binding arbitration because the decision affected a Local 888 member’s ‘conditions of employment’ and was not specifically or partially preempted by the Title IX Regulations.” (Aa18).

b. Compliance with both Title IX regulations and the CNA is possible, thus, there can be no implied conflict.

The Appellate Division, affirming PERC, correctly found “no preemptive intention or conflict precluding Local 888’s independent grievance procedure.” (Aa18). That is, the University can comply with both the Title IX regulations and the CNA because they are separate and distinct processes. The Appellate Division rejected the University’s claims that the Title IX disciplinary process would be undermined or “collaterally attacked” by the grievance process and noted that “the Title IX Regulations would have preempted a separate pre-discipline sexual

harassment grievance process, but Local 888's request for arbitration was filed after Rutgers' decision to "terminate [J.M.] for just cause." (Aa18).

The Title IX Regulations do not provide meaningful appeal rights or independent review, and thus do not conflict with a separate process that provides such rights. The "appeal" allowed by the University policy is extraordinarily narrow in scope and adjudicated before an individual who is, if anything, even less neutral than the merits decision-maker, since they are an employee of Rutgers as opposed to the decision-maker who was hired by Rutgers' to conduct the Title IX hearing. (Pa149). The University's contrary assertion that Title IX provides employees with its sole "alternative statutory remedy against unjust discipline" is without merit because applicable statutory remedies, including the EERA's statutory grant of a right to a negotiated grievance procedure, as well as appeals to the Civil Service Commission or the Tenure Board, contain robust due process protections after discipline is imposed. The adjudication of the disciplinary dispute is also before a wholly independent entity, the grievance arbitrator, unlike a Title IX decision-maker appointed by the employer itself. *See, e.g., N.J.S.A. 18A6-10, et seq.; N.J.A.C. 4A:2-2.2.*

If Title IX regulations preempt arbitration of discipline, it would strip the union of its negotiated rights. The University's policy does not include the union

as a party to the proceedings. The only opportunity for the union to enforce the CNA is through the grievance process. The unit member employee is a party to the Title IX process, but under New Jersey law, only the union may file for and be a party to the grievance arbitration. N.J.S.A. 34:13A-62. (“Only the parties to a collective negotiations agreement shall have the authority to invoke the arbitration procedures of the agreement and the public employer and the employee organization shall be the only parties to the arbitration proceeding invoked pursuant to the collective negotiations agreement.”)

Lastly, significant safeguards are found in public sector labor arbitrations because “statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply. As such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement.” *West Windsor Tp. v. PERC*, 78 N.J. 98, 116 (1987); *see also Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass’n*, 98 N.J.523, 527-28 (1985). The relevant aspects of Title IX are already incorporated into the CNA and its provisions would be binding on any arbitrator tasked with interpreting the statute, reducing the risk that an interpretation of the CNA would lead to results

contrary to Title IX.^{6/} Should an arbitration award itself run afoul of Title IX, it could be challenged in court. Rutgers' speculation that an award might violate the law does not render discipline imposed pursuant to Title IX policies outside the scope of negotiations.

CONCLUSION

For the above reasons, PERC respectfully requests this Court deny the petition for certification, as it does not possess the special reasons required for certification.

Respectfully submitted,

/s/ William J. Campbell
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DATED: January 27, 2025

^{6/} “In the public sector, the public interest, and other pertinent statutory criteria are inherent in the standards that inform and govern public sector arbitration. In the public sector, unlike the private sector, public policy demands that the arbitrator follow the law and consider the public’s interest and welfare.” *N.J. Tpk. Auth.* 143 N.J. at 198 (internal citations omitted). An arbitration award is further subject to judicial review. *Id.*; N.J.S.A. 2A:24-8.